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No. 02-137

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

JOHN LOUIS VISCIOTTI, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO RESPONDENT VISCIOTTI'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner, Jeanne Woodford, Warden, California State Prison at San Quentin [hereafter the State], respectfully submits this reply to Respondent John Louis Visciotti's Opposition to Petition for Writ of Certiorari. Pursuant to Rule 15.6, the State addresses only new points raised in Visciotti's opposition brief.

I.

VISCIOTTI FAILS TO SHOW THE CALIFORNIA SUPREME COURT'S DECISION WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE UNITED STATES SUPREME COURT

Visciotti contends that the California Supreme Court's use of the term "would have" in discussing the prejudice showing under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is equivalent to use of the term "probable" or "more likely than not," rather than the correct standard of "reasonable probability." Opp. at 9, 11, quoting *In re Visciotti*, 14 Cal. 4th 325, 351, 926 P.2d 987, 58 Cal. Rptr. 2d 801 (1996). There is no basis to so interpret the term. The

California Supreme Court said Visciotti's attempt to show that "if the jury had been made aware that his family background led to his substance abuse and assaultive conduct while under the influence of drugs a different penalty verdict would have been reached is unpersuasive." *In re Visciotti,* 14 Cal. 4th at 351, App. D at 137, emphasis added. The term "would have" does not connote any standard of probability. Visciotti, without justification, merely assigns the term the meaning which supports his argument.

Visciotti argues that the State tries to rewrite the California Supreme Court's opinion when the State contends that the California Supreme Court's use of the term "probable" in discussing prejudice under *Strickland* was merely shorthand for the correct standard of "reasonable probability." Opp. at 1, re Petn. at 8-14. In support of its contention, the State cited similar use of shorthand terms in opinions by this Court. Petn. at 11-12. Visciotti attempts to explain away such use of the term "probably" in *Williams v. Taylor*, 529 U.S. 362, 393, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) by noting the term was used in a summary of the state court's analysis. Opp. at 12. However, he fails to note that the term is this Court's language, not the language of the state court. *Williams,* 529 U.S. at 393.

He tries to explain away a similar use of the term "probable" in *Mickens v. Taylor*, __ U.S. __, 122 S. Ct. 1237, 1240, 1231, 1245, 152 L. Ed. 2d 291 (2002), slip opn. at 3, 11, by noting there was no prejudice analysis in *Mickens*. Opp. at 12. While correct, his point is meaningless. The term was used in *Mickens* as shorthand for the reasonable probability standard of *Strickland*. This is just what the California Supreme Court did. Tellingly, Visciotti fails to even attempt to explain away the similar use of the term "reasonably likely" in *Strickland* (see Petn. at 11, citing *Strickland,* 466 U.S. at 696) and the express reference in *Mickens* to use of a shorthand term for a legal standard (see Petn. at 12, citing *Mickens,* 122 S. Ct. at 1243, slip opn. at 8-9). The cited cases show the use of a shorthand term for a legal standard is common. Such usage does not mean a

court has used the wrong standard, particularly when the court has also stated the correct standard, as the California Supreme Court did.

II.

VISCIOTTI FAILS TO SHOW THAT THE CALIFORNIA SUPREME COURT'S DECISION WAS AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE UNITED STATES SUPREME COURT

Visciotti appears to argue that the Court of Appeals concluded the California Supreme Court decision was an unreasonable application of this Court's precedent on two independent grounds: 1) because the California Supreme Court failed to consider the totality of the available mitigating evidence in reweighing the mitigating evidence against the aggravating evidence, and 2) because the California Supreme Court's determination that the aggravating evidence was overwhelming and thus precluded relief, was objectively unreasonable. Opp. at 6, 12, 15. Respondent submits that the Court of Appeals' determination had just one ground, which consisted of two parts - first, that in assessing prejudice, the California Supreme Court failed to consider the totality of the mitigating evidence and trial counsel's failings, and, second, that the California Supreme Court erroneously viewed the aggravating factors as overwhelming, which allowed it to find there was no prejudice from trial counsel's alleged deficient performance. See *Visciotti v. Woodford*, 288 F.3d 1097, 1118-19 (9th. Cir. 2002), App. A at 65-68.

Visciotti argues that in *Williams*, 529 U.S. at 362, this Court found the Virginia Supreme Court did not consider the totality of the mitigating evidence in determining prejudice under *Strickland*, even though the state court opinion mentioned the mitigating evidence from trial and the unpresented mitigating evidence. He appears to contend this Court so found because the state court opinion did not discuss all of such mitigating evidence in its prejudice analysis. Visciotti contends the

California Supreme Court made the same error here, and he argues that the State has failed to distinguish the errors in the two cases. (Opp. at 14-15.)

Visciotti misreads the opinions of this Court and the Virginia Supreme Court. In *Williams* this Court found the Virginia Supreme Court failed to evaluate the totality of the mitigating evidence in reweighing it with the aggravating evidence, and specifically noted that the state court did not even mention "the sole argument in mitigation by trial counsel, that the defendant turned himself in, alerting police to a crime they otherwise would never have discovered, expressing remorse . . . , and cooperating with the police after that." *Williams*, 529 U.S. at 397-98. Examination of the Virginia Supreme Court's opinion shows the only reference to the above quoted matters was in a description of the state habeas (and trial) judge's findings of fact and conclusions of law following the evidentiary hearing. The Virginia Supreme Court noted the judge:

> [H]ad found that trial counsel 'made a tactical decision to focus attention at the penalty phase' on the accused's confession, which was unsolicited and volunteered. Counsel's strategy, the court concluded, was to convince the jury that the accused's life should be spared, and that he should be given a life sentence, because of the unsolicited confession.

Williams v. Warden, 254 Va. 16, 22, 487 S.E.2d 194 (1997).

The Virginia Supreme Court did not even mention trial counsel's argument. The reader cannot tell if the reference to strategy refers to evidence, argument or something else. The Virginia Supreme Court did not mention that the defendant had turned himself in, that had he not done so the police would never have even discovered the crime, that he cooperated with the police after that, and that he expressed remorse. *Williams*, 529 U.S. at 398. There was no such failure by the California Supreme Court

in its opinion here. See Petn. at 17-19; citing *In re Visciotti*, 14 Cal. 4th 330-34, 336-51. The two cases are not analogous.

Visciotti claims "the State does not challenge the weight or legitimacy of the available mitigating evidence, . . ." Opp. at 16. While the State does not dispute the fact that there was unpresented mitigating evidence regarding Visciotti's chaotic family life as a child, the State does not accept all of such evidence at face value. More to the point, the California Supreme Court reviewed all of the available mitigating evidence, reweighed that evidence against the aggravating evidence, and found the aggravating evidence was still overwhelming in comparison.

Visciotti appears to argue that the only fault the State finds with the Court of Appeals' determination that the California Supreme Court's decision was an unreasonable application of *Strickland*, is that in evaluating for prejudice the Court of Appeals erred in considering the length of jury deliberations and the fact the jury had questions. Opp. at 16. He also contends the State has failed to show "any reason" to question the ruling of the Court of Appeals that it was objectively unreasonable for the California Supreme Court to find no prejudice. Opp. at 16. On the contrary, the State contends the Court of Appeals failed to give proper consideration to the California Supreme Court's reasons for finding no prejudice, and, in effect, decided the issue of prejudice de novo. The State further contends that in doing so, the Court of Appeals failed to give sufficient weight to the strength of the aggravating evidence, inappropriately accepted the defense mitigating evidence at face value, and incorrectly accepted the allegations of trial counsel's improper concessions in closing penalty phase argument as proven. The bottom line is that the Court of Appeals effectively substituted its judgment for that of the California Supreme Court, in violation of the deferential standard of review required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

The State also contends that the Court of Appeals inappropriately used the fact the jury had a question after one day of deliberations to justify its conclusion that the jury

struggled, i.e. that the aggravating factors were not overwhelming. See Petn. at 21. The aggravating factors were in fact overwhelming. As the California Supreme Court noted, the circumstances of the crime, the "execution of one and attempted execution of the other, victims of a preplanned robbery" and the other aggravating evidence, the prior "knifing of William Scofield and the pregnant Kathy Cusack as she lay in bed trying to protect her fetus, were devastating." *In re Visciotti,* 14 Cal.4th at 355, App. D at 147. These circumstances fully supported the California Supreme Court's determination that the aggravating evidence was overwhelming.

III.

VISCIOTTI'S OPPOSITION CONTAINS FACTUAL INACCURACIES

Visciotti states his trial counsel provided no information to court appointed doctors who were to evaluate his mental status and disregarded their requests for such information. Opp. at 4. In fact, one doctor obtained police reports and other materials, and the other doctor obtained unspecified documents from trial counsel's office. *In re Visciotti,* 14 Cal. 4th at 338-39, App. D at 103, 106.

Visciotti claims there was evidence to support a mitigating interpretation of several sentencing factors under California Penal Code section 190.3. Opp. at 4. In fact, there was an evidentiary basis to argue only three such factors and the evidence provided a credible argument on only one such factor.

Visciotti mischaracterizes the California Supreme Court's evaluation of the mitigating evidence in his description of the state court opinion. Opp. at 5. He uses a statement by a hired defense expert witness in combination with the California Supreme Court's language regarding that witness's description of the family, in an attempt to portray the California Supreme Court as agreeing with the expert that there were "'overwhelming mitigating circumstances' in 'an absolute horrendous family history' of abuse . . . ." Opp. at 5, quoting *In re Visciotti,* 14 Cal. 4th at 341, App. D at 111. Visciotti juxtaposes this quotation of the defense expert with the California Supreme Court's later statement that state habeas evidentiary hearing testimony of family members was "consistent" with that defense expert's description of Visciotti's social history. See *In re Viscotti,* 14 Cal. 4th at 344-45, App. D at 120-21. The California Supreme Court did not adopt or use that description.

In one of his quotes of the California Supreme Court's use of the term "probable," Visciotti inaccurately indicates the term was used in conjunction with "evidence [of drug addiction]."

Opp. at 9, quoting *In re Visciotti,* 14 Cal. 4th at 355. The evidence referred to was, in fact, the unpresented evidence of his "family background, the expert testimony about that background, and the expert opinion that petitioner's drug abuse and assaultive conduct while under the influence of drugs were a product of growing up in a dysfunctional family in which he suffered continual psychological abuse." *In re Viscotti,* 14 Cal. 4th at 355, App. D at 146.

Visciotti has failed to show that the California Supreme Court's decision rejecting his claim of ineffective assistance of counsel at penalty phase trial was contrary to or an unreasonable application of this Court's precedent.

CONCLUSION

Based on this reply and the State's Petition for Writ of Certiorari, the petition should be granted.

Dated: September 5, 2002

Respectfully submitted,

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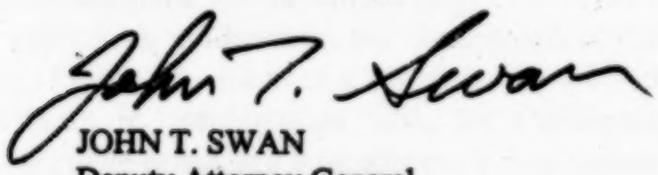

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